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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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TO THE
COURT OF CRIMINAL APPEALS
OF TEXAS

Donald Ray Couthren

vs.

The State of Texas

BRIEF OF APPELLANT
DONALD RAY COUTHREN

On Petition for Review from the
Thirteenth Court of Appeals
No. 13-16-00543-CR
and
Brazos County
Cause Number 12-04815-CRF-361
361st District Court

Clint F. Sare
TX Bar No. 788354
P.O. Box 1694
Bryan, Texas 77806
(979) 822-1505
cfs@sarelaw.com

Counsel for Appellant

IDENTITY OF PARTIES

Trial Court Judge:	Steve Smith Judge of the 361st District Court Brazos County, Texas
Appellant:	Donald Ray Couthren
Trial Counsel:	John Quinn 404B East 27th St. Bryan, Texas 77803
	Shannon B. Flanigan P.O. Box 482 Bryan, Texas 77803
Appellate Counsel:	Clint F. Sare PO Box 1694 Bryan, Texas 77806

For the State of Texas:

Trial Counsel:	Philip McLemore Ryan Calvert Brazos County District Atty. Ofc. 300 E. 26th Street Bryan, Texas 77803
Appellate Counsel:	Rashmin Asher Douglas Howell, III Brazos County District Atty. Ofc. 300 E. 26th Street Bryan, Texas 77803

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

A Brazos County jury found Appellant guilty of the felony offense of Driving While Intoxicated with two or more previous convictions. The jury also found that his operation of the vehicle was use of a deadly weapon during the offense. The trial court imposed a sentence of six years confinement and denied Appellant's motion for a new trial.

PROCEDURAL HISTORY

Appellant presented two issues to the Thirteen Court of Appeals challenging the denial of his motion for new trial and the sufficiency of the evidence that he used or exhibited a deadly weapon during commission of the offense. In a May 3, 2018 opinion, the court of appeals overruled both issues and affirmed Appellant's conviction. This Court granted review on Appellant's first issue challenging the deadly weapon finding.

GROUND FOR REVIEW

The opinion of the court of appeals is in conflict with opinions of this Court holding there must be evidence of dangerous or reckless operation of a vehicle to support a finding that the vehicle was a deadly weapon and holding that the occurrence of a collision and consumption of alcohol alone do not satisfy that burden. (2 RR 139, 157; CR 19).

STATEMENT OF FACTS

In June 2015 Appellant lived in a house north of Bryan. The mother, grandmother, and two daughters of his then girlfriend Jennie Rios also lived there. (2 RR 81, 154, 157). After working around his house Appellant had two alcoholic drinks at his home and went to bed. (2 RR 153-54). He was awakened about 2 a.m. by one of Jennie's daughters. (2 RR 156). She was upset because Jennie was "getting messed up" on drugs at the home of her cousin in Bryan. (*Id*.) The daughter asked Appellant to go get Jennie. (*Id*.)

About the same time, a man named Frank was leaving a bar on Tabor Road after becoming intoxicated there. (2 RR 136-38). When he could not get a ride but was told to leave the property, Frank started walking down the right side of the road toward a main highway. (2 RR 139).

On his way to try to get Jennie Appellant took the same road where Frank was walking. He was driving about 30 miles per hour[1] (2 RR 172) when, based on the only evidence on the issue, Frank "walked out in front of" his car. (2 RR 41, 157). Appellant testified that Frank was wearing dark clothing and that when he saw Frank in the roadway he swerved to avoid a collision but could not. (2 RR 158-59). At trial Frank testified he had no

[1] There was no evidence this was above the posted speed limit for the road or unsafe for the conditions.

recollection of the collision and did not controvert Appellant's testimony. (2 RR 139).

In the collision Frank's head hit the windshield on the passenger side of the car, causing substantial damage. (2 RR 158). Appellant stopped, spoke to Frank who was "mumbling" and disoriented but conscious. (2 RR 159). Because Frank was "groggy" rather than "out cold," Appellant helped him into his car to take him to the hospital. (2 RR 160). Because the windshield of his car was badly damaged (2 RR 50), Appellant continued south to the house where Jennie was because she had been driving another car he owned. He intended to use the car without a damaged windshield to continue to the hospital. (2 RR 160). It was undisputed he drove to the home of Jennie's cousin without incident in spite of the condition of the windshield. Although not well-developed, the record suggests that both the house and hospital were in the same direction from the accident location. (2 RR 177).

When he arrived at the house Appellant was confronted and accosted by five men who had followed Jennie and her cousin home from a bar. (2 RR 163-64). A neighbor called the police. (2 RR 33). Police arrived, saw the damaged car and Frank, and called an ambulance for him. (2 RR 39). Although Appellant told police where the collision occurred, and officers admitted at trial he gave them the same explanation on the cause of the

collision when they interviewed him that night (2 RR 41), no officer ever went to the scene to look for any evidence of whether the collision occurred in the roadway or not. (2 RR 58). Officers arrested Appellant for driving while intoxicated when he declined to perform field sobriety testing. (2 RR 109-110). Officers did not interview Jennie or any of the five men at the house. (2 RR 67-68). The officers allowed the men to walk off without being interviewed simply because they "didn't want to be part of the investigation." (2 RR 68).

Appellant was charged by indictment with the felony offense of driving while intoxicated with previous convictions and aggravated assault with a deadly weapon. (CR 5). The State proceeded to trial only on the charge of driving while intoxicated. (2 RR 15). The State's notice of intent to seek a deadly weapon finding is not shown in the record but defense counsel did not assert a lack of notice when the allegation was presented at trial.[2] (2 RR 16).

At trial the State expressly disclaimed to the jury any burden to show that Appellant was at fault in the collision. (2 RR 18). The State presented no objective evidence of Appellant's intoxication. It was not able to present evidence of breath or blood testing or Appellant's performance on field

[2] Notice of intent to seek a deadly weapon finding need not be contained in the indictment. *Ex parte Beck*, 769 S.W.2d 525, 526 (Tex.Crim.App. 1989).

sobriety testing. (2 RR 109, 111). The State relied on the opinion of officers based on general observations of Appellant at the house (2 RR 55), and the opinion of Rios. (2 RR 74).

Consistent with its assertion it had no burden to show the cause of the accident, the State presented no evidence on that issue. In arguing the deadly weapon issue during summation, the State argued that it need only show the vehicle was "capable of causing death or serious bodily injury" and that by driving 30 miles per hour it was. (2 RR 191). The State even argued that by stopping and transporting the pedestrian, Appellant used the vehicle as a deadly weapon. (*Id*.). The State abandoned this argument on appeal. *See* Tex. Trans. Code § 550.023(3) (establishing duty to transport or make arrangements for transporting a person injured in an accident).

Before the Thirteenth Court of Appeals Appellant relied on the same authority cited above, with the exception of opinions issued after the filing of his brief in February 2017. The State argued the evidence of a collision and Appellant's intoxication, standing alone, were sufficient. The analysis of the Thirteenth Court of Appeals consisted of two paragraphs which focused exclusively on the evidence that Appellant had consumed alcohol and "was unable to avoid striking [the pedestrian] at a decent rate of speed[.]" Slip op. at 10.

ARGUMENT

Ground for Review: The opinion of the court of appeals is in conflict with opinions of this Court holding there must be evidence of dangerous or reckless operation of a vehicle to support a finding that the vehicle was a deadly weapon and holding that the occurrence of a collision and consumption of alcohol alone do not satisfy that burden. (2 RR 139, 157; CR 19).

The Significance of a Deadly Weapon Finding

A finding that a person used or exhibited a deadly weapon during the commission of a felony offense precludes a court from suspending their sentence and placing the person on community supervision. Tex. Code Crim. Proc. art. 42.12 § 3g(a)(2).[3] This limitation has been part of Texas law for the last 40 years. *See, Polk v. State,* 693 S.W.2d 391, 393 (Tex.Crim. App. 1985) (Discussing legislative history of the statute). A deadly weapon finding also affects the date on which a defendant is eligible for parole. Tex. Gov. Code § 508.145(d)(1)(B).

The Penal Code provides a definition of "deadly weapon." Tex. Pen. Code 1.07(a)(17). This Court has held that to sustain a deadly weapon finding the evidence must show; (1) the object meets the statutory definition of a deadly weapon, (2) the object was used or exhibited during the transaction

[3] This case was decided under the version of the Code of Criminal Procedure in effect in 2016. The same limitation was carried forward to the version of the Code of Criminal Procedure which became effective on January 1, 2017. *See* Tex. Code Crim. Proc. art. 42A.054(b); Act of June 17, 2015, 84th Leg. R.S., Ch. 770 (H.B. 2299) § 4.02.

giving rise to the felony conviction, (3) others were put in actual danger and (4) the weapon was used to facilitate the offense. *Plummer v. State*, 410 S.W.3d 855, 863 (Tex.Crim. App. 2013); *Drichas v. State*, 175 S.W.3d 795, 798 (Tex.Crim.App. 2005).

Vehicles as Deadly Weapons

Soon after an affirmative deadly weapon finding became a bar to probation eligibility our courts were called upon to apply the statutory language to cases where the weapon alleged was an automobile. Because an automobile is not "designed, made or adapted for the purpose of inflicting death or serious bodily injury, it is not a deadly weapon *per se* but may become a deadly weapon depending on the manner of its use. *See* Tex. Pen. Code § 1.07(a)(17); *Brister v. State*, 449 S.W.3d 490, 494 (Tex.Crim.App. 2014); *Ex parte McKithan*, 838 S.W.2d 560 (Tex.Crim.App. 1992).

This Court has Established a Clear Rule

The Court has held that when the State alleges a motor vehicle was used as a deadly weapon there must be evidence that the vehicle was operated in a reckless or dangerous manner to satisfy the statutory definition of a deadly weapon. A survey of this Court's opinions on the issue show the Court has consistently rejected attempts to disregard the "manner of its use" language from the statutory definition. Those attempts have consisted of arguments

that the mere act of driving while intoxicated, or being involved in a collision, establish use in a manner which meets the definition. This case is another instance and requires correction by this Court.

The "manner of use" requirement was illustrated in *Tyra v. State*, where the defendant was convicted of involuntary manslaughter for accidentally causing a death while operating a motor vehicle due to his intoxication. 897 S.W.2d 796 (Tex.Crim.App. 1995). The defendant's complaint on appeal was that there was no evidence of an intent to use the vehicle in a manner to cause death or serious bodily injury. *Id* at 797. There was no factual dispute that the cause of the collision and death was that the defendant "was too drunk to control the vehicle." *Id*. at 798. There was evidence that the defendant "had been driving at a high rate of speed, estimated at eighty miles per hour, and had jumped a median and nearly collided with another vehicle" before the fatal collision. *Tyra v. State*, 868 S.W.2d 857, 859 (Tex.App.—Fort Worth 1993), *aff'd*, 897 S.W.2d 796 (Tex.Crim.App. 1995).

This Court's opinion recognized that a thing which actually causes death is, by definition, *capable* of causing death. 897 S.W.3d at 798. It did not adopt a *post-hoc* reasoning that evidence of a death alone was sufficient to support a deadly weapon finding. In resolving the issue before the Court, it held: "Whether [the statute] means mere possession, the question actually

presented in *Narron*[4] and *Petty*,[5] may have been a close question. Whether it means *driving an automobile recklessly* enough to endanger the lives of other people is not." 897 S.W.3d at 799 (emphasis added). The holding was clear; evidence of a death is insufficient without the evidence the defendant was driving recklessly. The evidence there showed the defendant was.

Six years later this Court affirmed the deadly weapon finding in *Mann v. State*, where the defendant was convicted of driving while intoxicated. 58 S.W.3d 132 (Tex.Crim.App. 2001). The evidence there showed the defendant was intoxicated when he drove a vehicle through a downtown area and "nearly hit another vehicle head-on." *Id*. The issue on appeal was whether former article 42.12, §3g(a)(2) of the Code of Criminal Procedure authorized a deadly weapon finding in a prosecution for driving while intoxicated. Adopting the analysis of the opinion by the Austin Court of Appeals, this Court affirmed. *Id*. The evidence supporting the deadly weapon finding included the testimony of an officer who saw the defendant drive over a curb and miss a turn almost causing a head-on collision. *Mann v. State*, 13 S.W.3d 89, 91 (Tex.App.—Austin 2000), *aff'd*, 58 S.W.3d 132 (Tex.Crim.App. 2001).

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[4] *Narron v. State*, 835 S.W.2d 642 (Tex.Crim.App. 1992).

[5] *Ex parte Petty*, 833 S.W.2d 145 (Tex.Crim.App. 1992).

In a concurring opinion Judge Johnson emphasized that the holding, and the holding in *Tyra*, should not be taken as holding that a deadly weapon finding would be supported all driving while intoxicated cases. 58 S.W.3d at 133. He noted the act of driving, even while intoxicated does not necessarily constitute driving in "a manner capable of causing death or serious bodily injury." *Id*.

The issue was before the Court again three years later in *Cates v. State*, 102 S.W.3d 735 (Tex.Crim.App. 2003). There the defendant unknowingly drove past the scene of an earlier accident. The driver of the first accident had pulled his passenger from his burning vehicle and left to call for help. 102 S.W.3d at 736. In driving past the scene, the defendant, Cates, struck and killed the passenger who was then in the roadway. Cates continued without stopping and witnesses followed his truck to obtain the license plate number. Cates was prosecuted for failure to stop and render aid. The State also alleged his truck was used as a deadly weapon. Cates challenged the deadly weapon finding. *Id*. The Fourteenth Court of Appeals affirmed that finding. 66 S.W.3d 404 (Tex.App.—Houston [14th Dist.] 2001).

Because the charged offense was leaving the accident scene, this Court looked at Cates' operation of the vehicle during that time. The evidence showed during the time he was leaving the scene Cates did not leave the

roadway, was not driving fast and stopped at a stoplight where the witnesses obtained the license plate number. 102 S.W.3d at 738. This Court rejected the State's contention that the vehicle was used as a deadly weapon based on the undisputed evidence that a person was struck and killed by the vehicle. *Id*. at 739. The Court held that evidence "refutes the conclusion the truck was driven dangerously." Consequently, the evidence did not support a deadly weapon finding even though it was undisputed the defendant had struck and killed a pedestrian and had admitted to drinking alcohol. 102 S.W.3d at 738.

In *Drichas v. State*, this Court found the evidence that the defendant led police on a high-speed chase where he failed to yield to traffic, fishtailed, disregarded traffic signs and signals and drove on the wrong side of the highway with other traffic present was sufficient to support a deadly weapon finding based on his operation of the vehicle. 175 S.W.3d 795, 799 (Tex. Crim.App. 2005).

The issue next came before the Court in another driving while intoxicated case in *Sierra v. State*, 280 S.W.3d 250 (Tex.Crim.App. 2009). There the defendant was convicted of driving while intoxicated after a collision which resulted in injuries. The judgment also contained a deadly weapon finding. The court of appeals sought to apply this Court's prior holdings and determined there was an absence of evidence he was driving in

a "reckless, threatening, careless, or dangerous manner." It concluded the evidence did not support a deadly weapon finding.

The State's petition for discretionary review made the very argument Judge Johnson cautioned against in *Mann*. 58 S.W.3d at 133. It argued that there is no requirement to show a reckless, threatening, careless, or dangerous driving to support a deadly weapon finding and such a finding could be made in "all felony DWI cases." 280 S.W.3d at 253. This Court rejected the State's request to "rely on the single factor of intoxication." 280 S.W.3d at 256. In determining whether the defendant's use of the vehicle brought it within the statutory definition of a deadly weapon, the Court looked to the evidence on the manner in which the defendant was driving. That evidence included the investigating officer's testimony that an undistracted driver in the defendant's position should have been able to stop far before a collision. *Id*. That evidence supported a finding that he was speeding and failed to maintain control of his vehicle. *Id*. The Court concluded that based on that evidence "it was reasonable for the jury to conclude that Sierra's driving was dangerous and reckless while intoxicated." *Id*.

In *Brister v. State*, the State once again argued that it had no obligation to establish that operation of a vehicle was reckless or dangerous to support a deadly weapon finding if it established the driver was intoxicated. 449 S.W.3d

490 (Tex.Crim.App. 2014). The evidence there was that an officer observed the defendant cross the roadway center line one time. *Id*. at 491. In an effort to avoid the well-established rule that there must be evidence of actual danger from the driver's operation of the vehicle, the State argued the driver was endangering himself. *Id*. at 493. The Court rejected the argument, holding a single violation which did not actually endanger any other person was insufficient. 449 S.W.3d at 495.

This Court recently reviewed this line of authority and affirmed the rule that there must be evidence of reckless or dangerous driving to support a deadly weapon finding in a DWI case. In *Moore v. State*, the defendant failed to stop behind two vehicles waiting at a traffic light. Due to that failure he collided with one of the vehicles with sufficient force that it pushed a preceding SUV into the intersection. 520 S.W.3d 906, 912-13 (Tex.Crim.App. 2017). Although the collision only caused minor injuries, the evidence on the cause of the collision was the Defendant's failure to apply his brakes and control his vehicle. *Id*. at 912-13. Like *Sierra*, there was also undisputed evidence that the defendant had a blood alcohol content sufficient to establish *per se* intoxication. *Id.* at 907. The court of appeals considered five factors it had previously identified in *Cook v. State*, 328 S.W.3d 95 (Tex.App.—Fort Worth 2010, pet. ref'd). Those factors are: (1) intoxication, (2) speeding, (3)

disregarding traffic signs and signals, (4) driving erratically, and (5) failure to control the vehicle." *Id*. at 100. Without expressly approving or disapproving of reliance on those factors, in analyzing the evidence this Court placed weight on the inference a factfinder could draw concerning the Defendant's speed from the fact the impact pushed two vehicles forward, the fact he disregarded both the stop light and the two vehicles stopped for the light, the undisputed failure to control his vehicle, and the undisputed evidence of intoxication. 520 S.W.3d at 912-13. On that evidence the Court concluded the Defendant's used his vehicle in a matter that put others at substantial danger of death or serious bodily injury and supported the deadly weapon finding. *Id*. at 914.

In *Safian v. State*, evidence that the defendant intentionally drove his vehicle at an officer, then led the officer on a high-speed chase during which the defendant disregarded stop signs, drove into oncoming traffic before colliding with another vehicle was sufficient to support a deadly weapon finding. 543 S.W.3d 216 (Tex.Crim. App. 2018).

The Court's most recent opinion where a deadly weapon finding was made in a judgment for driving while intoxicated was issued October 3, 2018 in *Briggs v. State*, No. PD-1359-17, 2018 WL 4762391 (Tex.Crim.App. Oct. 3, 2018). The propriety of the deadly weapon finding was not at issue there.

This line of authority clearly establishes a rule that a finding that a vehicle was used as a deadly weapon must be supported by evidence establishing, or at least supporting an inference of, reckless or dangerous driving. These opinions also consistently rejected the fallacious *post hoc ergo propter hoc* conclusion that evidence of drinking and a collision are sufficient to establish reckless or dangerous operation. *See Moore*, 520 S.W.3d at 912; *Cates*, 102 S.W.3d at 739.

The Courts of Appeals' Application of the Rule

The resolution of challenges to deadly weapon findings by the intermediate courts presented with various facts further illustrate the standard established by this Court.

When two intoxicated drivers collided at a controlled intersection, but fault could not be determined due to the absence of eyewitnesses, the Tyler Court of Appeals found the evidence insufficient to support a deadly weapon finding. *English v. State*, 828 S.W.2d 33, 38 (Tex.App.—Tyler 1991, pet. ref'd). Evidence that an intoxicated driver struck a pedestrian, not in the roadway, but while he was mowing his yard, was found sufficient evidence of reckless driving to support a deadly weapon finding. *Cook v. State*, 328 S.W.3d 95 (Tex.App.—Fort Worth 2010, pet. ref'd). An officer's direct observation of defendant's driving which including weaving and crossing into

the oncoming lane of traffic four or five times supported a deadly weapon finding and conviction for driving while intoxicated in *Davis v. State*, 964 S.W.2d 352 (Tex.App.—Fort Worth 1998, no pet.). Each of these holdings is consistent with the rule established by this Court.

In the court of appeals, the State cited two unpublished opinions from intermediate courts for the proposition that evidence of a collision supports a finding that a defendant was operating their vehicle in a "reckless and dangerous" manner. Those cases were *Pena v. State*, No. 07–15–00016–CR, 2015 WL 6444831 (Tex.App.—Amarillo Oct. 22, 2015, no pet.) (not designated for publication), and *Erikson v. State*, No. 03–13–00241–CR, 2014 WL 4179426 (Tex.App.—Austin Aug. 21, 2014, no pet.) (not designated for publication).

As this Court is well-aware, Rule of Appellate Procedure 47.7(a) provides that memorandum opinions not designated for publication "have no precedential value but may be cited with the notation '(not designated for publication.)'" When an opinion has no precedential value there is no obligation to follow or even distinguish the opinion. *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex.App.—Amarillo 2003, pet. ref'd).

Even if they are considered, neither of those opinions support the position that proof of a collision by a person who has consumed alcohol,

standing alone, can support a deadly weapon finding. *Pena* is consistent with the evidentiary standard established by this Court because the evidence there showed more than "the unadorned fact of a collision,"[6] it showed the other driver followed the defendant and observed him driving over a curb and nearly drive into a residential yard. 2015 WL 6444831. In *Erikson*, although the court appeared to give inordinate weight to the fact of a collision, there was also evidence that the defendant was looking at his telephone at the time of the collision. 2014 WL 4179426.

The Thirteenth Court of Appeals Failed to Correctly Apply the Law.

In this case the Thirteenth Court of Appeals determined the evidence supported the deadly weapon finding by applying the very type of *post hoc* reasoning this court has rejected. While citing this Court's opinion in *Sierra*, the court of appeals disregarded the holding in *Sierra* that there must be evidence beyond the occurrence of a collision to support a finding the defendant's driving was reckless or dangerous. 280 S.W.3d at 256.

Here the court of appeals conceded:

> [T]he speed in [sic] which Couthren was driving is unknown, he testified that he was travelling around thirty miles per hour on a lightly traveled highway access road. We do not know the

[6] *See Moore*, 520 S.W.3d at 912.

> manner in which Couthren was driving seconds before hitting [the pedestrian], if Couthren applied his brakes prior to the accident, or for certain, if there were other cars on the road.
>
> Slip op. at 10.

The court of appeals then proceeded to use the fact of the collision and evidence that Appellant had consumed alcohol[7] to substitute for evidence on the manner in which Appellant was driving. The court held:

> However, the record shows Couthren had been drinking by his own admission and the testimony of the two officers. Couthren was unable to avoid striking Elbrich at a decent rate of speed, since Elbrich's head broke the windshield upon impact."
>
> Slip op. at 10.

The court's reliance on *Sierra* as support for its holding disregarded the substantial difference in the evidence in both cases. In *Sierra*, the evidence showed that officers conducted a detailed investigation of the cause of the collision. In addition to interviews of witnesses, an officer from a specialized accident division examined marks on the road, estimated the defendant's speed and determined the distance required to stop. 280 S.W.3d at 252. Here no officer so much as went to the scene much less conducted any investigation concerning the cause of the collision. There was no evidence whatsoever to controvert Appellant's testimony on the cause of the collision. (2 RR 58, 139).

[7] The evidence was that the alcohol was consumed hours before the collision. (2 RR 167).

A factfinder's authority to disbelieve any witness does not extend to finding contrary facts without any supporting evidence. Even if the jury disbelieved Appellant's testimony that the pedestrian stepped in front of his car, there was no evidence supporting an inference that Appellant had been driving in a reckless or dangerous manner. That dearth of evidence distinguishes this case from *Moore*, 520 S.W.3d at 512 (evidence of defendant's failure to apply brakes); *Sierra*, 280 S.W.3d at 256 (evidence showed failure to apply brakes although there was adequate distance), *Drichas*, 175 S.W.3d at 798 (fleeing from police), *Mann*, 58 S.W.3d 132 (defendant drover over curb and missed a turn nearly causing a head-on collision), and *Tyra*, 897 S.W.2d at 798 (Evidence established defendant "was too drunk to control the vehicle"). The facts presented in this case are even less favorable to the State than the most factually similar case of *English*, 828 S.W.2d at 38. There two intoxicated drivers collided at an intersection with no other witnesses. The other driver was killed, the defendant did not testify, and the State presented no witness who could testify as to which vehicle disregarded the signal.

Although this Court has permitted evidence of intoxication to be a factor supporting a finding that a defendant operated a vehicle in a reckless or dangerous manner, s*ee Moore*, 520 S.W.3d at 907; *Sierra*, 280 S.W.3d at 256,

it has never held that evidence a defendant had consumed alcohol and a collision occurred sufficient to support a deadly weapon finding. To the contrary, the Court has held there must be more to support such an inference. In *Cates* the consumption of alcohol before striking a pedestrian was insufficient to support a deadly weapon finding where the victim was killed. 102 S.W.3d at 739.

Even assuming the finding of guilt of the underlying offense established intoxication,[8] the opinions of this Court have required more than evidence of a collision and intoxication. In *Moore* that evidence was a combination of disregard of a traffic control signal, the vehicles stopped for that signal, and the speed that could be inferred from the force of the collision. 520 S.W.3d at 912-13. In *Sierra*, it was the eyewitness testimony and detailed accident investigation.

In *Moore*, this Court observed "this is not a case in which, in order to find sufficient evidence of a deadly weapon, we must infer reckless or dangerous driving from the unadorned fact that Appellant rear-ended another vehicle[.]" 520 S.W.3d at 912. Appellant's case presents those very facts. The State failed to present any evidence of reckless or dangerous driving, or

[8] Unlike *Moore* and *Sierra*, there was no evidence establishing intoxication *per se*. Here the State relied on the fact of the collision to establish intoxication (2 RR 199), then relied on the finding of intoxication to support the deadly weapon finding.

evidence from which a finding from which such conduct could be inferred. It presented nothing to controvert Appellant's evidence that the accident was the result of a pedestrian wearing dark clothing at night, stepped into the roadway in front of Appellant's car. (2 RR).

CONCLUSION

The holding of the Thirteenth Court of Appeals is in conflict with the holdings of this Court. This Court should apply its prior holdings and determine the evidence is legally insufficient to sustain the deadly weapon finding.

PRAYER FOR RELIEF

For the foregoing reasons, Appellant prays this Court sustain his ground for review and reform the trial court judgment to remove the deadly weapon finding.

Respectfully submitted,

_/s/_Clint_Sare____
Clint F. Sare
Tex. Bar Num. 00788354
P.O. Box 1694
Bryan Texas, 77806
(979) 822-1505
cfs@sarelaw.com

Attorney of Appellant.

CERTIFICATE

I certify the foregoing document does not exceed the word count limitation of Rule of Appellate Procedure 9.4(i)(2)(D) based on the computer software word count of 5,156 words.

I certify that a copy of the foregoing brief was served on the counsel listed below by electronic service on October 11, 2018.

Rashmin Asher
Brazos County District Attorney's Office
Rasher@brazoscountytx.gov

Stacey M. Soule
State Prosecuting Attorney

_/s/_Clint_Sare_____